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No. 76-270

In the Supreme Court of the United States

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DAVID C. HAKIM, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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Petitioner seeks certiorari prior to judgment by the court of appeals. He brought this suit in the United States District Court for the Eastern District of Michigan to enjoin the operation, as to other taxpayers, of several provisions of the Internal Revenue Code. Petitioner contends that these sections of the Code discriminate against lower and middle income taxpayers by according preferential tax treatment to "wealthy individuals and corporations" (Complaint, p. 2).[1]

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[1]The provisions of the Internal Revenue Code of 1954 (26 U.S.C. (and Supp. V)) petitioner challenged are: Section 46 (investment credit for specified types of business property); Sections 611 and 613 (depletion allowance for mines, oil and gas wells, other natural deposits and timber); Section 995 (special tax treatment for "domestic international sales corporations"); Section 1014 (basis of property acquired from a decedent); and Sections 1201 and 1202 (capital gains).

The district court refused to convene a three-judge court and dismissed petitioner's complaint on the grounds that he lacked standing to bring such a lawsuit and that he did not raise any substantial constitutional claim warranting consideration by such a court under 28 U.S.C. 2282. Petitioner's appeal is currently pending in the court of appeals (Pet. 3).

1. The questions presented—whether petitioner has standing to maintain this lawsuit and whether he has raised a substantial constitutional question requiring consideration by a three-judge district court—are not of such "imperative public importance" (Rule 20) as to warrant by-passing normal court of appeals review. This case has been fully briefed in the court of appeals, and that is the "regular court" in which these matters should "properly * * * be adjudicated * * * in the first instance." *Aaron* v. *Cooper*, 357 U.S. 566, 567.[2]

2. At all events, the district court correctly refused to convene a three-judge court because petitioner lacks standing and has not raised any "substantial" constitutional question. See *Ex parte Poresky*, 290 U.S. 30, 31-32; *Idlewild Liquor Corp.* v. *Epstein*, 370 U.S. 713, 715; *Swift & Co.* v. *Wickham*, 382 U.S. 111, 115.

a. Petitioner has no standing to maintain this lawsuit. As the Court recently observed in *Simon* v. *Eastern Kentucky Welfare Rights Organization*, No. 74-1124, decided June 1, 1976 (slip op. 11), "the relevant inquiry

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[2]A direct appeal to this Court is allowed under 28 U.S.C. 1253 from the judgment of a three-judge court empaneled under 28 U.S.C. 2282. But where the district court declines to convene such a court, it is the function of the court of appeals to review that determination. *Schackman* v. *Arnebergh*, 387 U.S. 427; *Wilson* v. *City of Port Lavaca*, 391 U.S. 352; *Mengelkock* v. *Industrial Welfare Commission*, 393 U.S. 83.

is whether * * * the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision. Absent such a showing, exercise of its power by a federal court would be gratuitous and thus inconsistent with the Art. III limitation."

Here, petitioner will not suffer the "kind of direct injury required for standing" (*United States* v. *Richardson*, 418 U.S. 166, 172) because he has no " 'personal stake in the outcome' " (*Simon* v. *Eastern Kentucky Welfare Rights Organization* (slip op. 11)) of the abstract issues he seeks to litigate. Petitioner challenges the constitutionality of various provisions of the Internal Revenue Code solely in his asserted capacity as a "member of the middle class" (Pet. 2, n. 2) on the theory that these provisions grant preferential tax treatment to more affluent taxpayers to the theoretical detriment of the middle class. But there is no immediate connection between one taxpayer's present or potential tax liability and the tax treatment accorded to others. As this Court held more than 50 years ago in *Frothingham* v. *Mellon*, 262 U.S. 447, 486-489, and reaffirmed in *United States* v. *Richardson*, *supra*, 418 U.S. at 171-180, a plaintiff cannot use his status as a taxpayer as a basis for requiring a federal court to hear what are essentially his " 'generalized grievances about the conduct of government.' " *Id.* at 173, quoting from *Flast* v. *Cohen*, 392 U.S. 83, 106.

b. With respect to the merits of petitioner's claims, he appears to argue that the Constitution compels the progressive rate structure of the federal income tax. Thus, he challenges the provisions in question (see n. 1, *supra*) on the theory that wealthy individuals must, as a constitutional matter, pay progressively greater taxes than others, so that any tax preference available to reduce their total tax liability is unconstitutional.

This Court, however, has always regarded the progressive rate structure of the tax statutes as a matter for determination by the legislature, which has substantial latitude in making reasonable distinctions between differently situated taxpayers. See *Knowlton* v. *Moore*, 178 U.S. 41, 109; *Brushaber* v. *Union Pac. R.R.*, 240 U.S. 1, 24-25; *Barclay & Co.* v. *Edwards*, 267 U.S. 442, 450-451; *Steward Machine Co.* v. *Davis*, 301 U.S. 548, 583-585. Thus, "legislative classification[s]" such as those in the tax law "will not be set aside if any state of facts rationally justifying * * * [them] is demonstrated to or perceived by the courts." *United States* v. *Maryland Savings-Share Ins. Corp.*, 400 U.S. 4, 6. There is no constitutional violation when Congress exercises its legislative judgment to "tax different types of taxpayers differently." See *Puget Sound Co.* v. *Seattle*, 291 U.S. 619, 624, 625; *Steward Machine Co.* v. *Davis, supra*, 301 U.S. at 584-585.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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